

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAVIER DIEGO URIBE,

No. C 03-5700 SI (pr)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

MICHAEL KNOWLES, Warden,

Respondent.

INTRODUCTION

Javier Diego Uribe, a California prisoner incarcerated at Mule Creek State Prison, has filed this pro se action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is now before the court for consideration of the merits of the habeas petition. For the reasons discussed below, the petition will be denied.

BACKGROUND

A. The Crimes

Uribe was convicted of sex offenses against four minors: committing lewd acts on Jane Doe 1 (14 counts), Jane Doe 3 (1 count) and Jane Doe 4 (1 count), as well as one count of committing a forcible lewd act on Jane Doe 2. At the trial, evidence also was presented of his sex offense against an 11-year old (Katherine M.) that led to a sexual battery conviction several years earlier. The evidence at trial included the following, which is largely taken from the California Court of Appeal's opinion and the parties' briefs.

1 Uribe knew Jane Doe 1 through his friendship with Jane Doe 1's mother and grandmother.
2 Jane Doe 1 was eight years old and in third grade at the time of the first touching incident. The
3 touchings stopped after the December 17, 1999 incident, when Jane Doe 1 was in fifth grade. The
4 touchings occurred at a variety of times and places and the behavior included touching Jane Doe
5 1's vagina over and under her clothing, touching her buttocks, putting his fingers inside her vagina,
6 and putting his mouth on her vagina and licking it.

7 Following the last molestation on December 17, 1999, Jane Doe 1 told several friends "that
8 there was a guy touching on [her]" and she told them Uribe's first name. Jane Doe 1 also told her
9 younger brother, who then told his friend Andrew, and Andrew told his grandmother. The
10 grandmother was a friend of Jane Doe 1's family and on December 20, 1999 asked Jane Doe 1 if
11 Uribe had been touching her. Jane Doe 1 admitted Uribe had "messed with her" and pointed to her
12 vagina. The grandmother then called Jane Doe 1's mother, and Jane Doe 1 told her mother some
13 details about the molestations.

14 Jane Doe 1's mother took Jane Doe 1 to the hospital. While there, Jane Doe 1 met with
15 a police officer. On December 22, 1999, Jane Doe 1 spoke with a social worker in the presence
16 of a different police officer, Officer Judy Stradan. On December 23, 1999 at the request of
17 Officer Stradan, Jane Doe 1 called Uribe on the telephone. The phone call was tape recorded.
18 Uribe made numerous incriminating statements. Uribe essentially admitted touching Jane Doe
19 1's vagina and putting his mouth on her vagina when, in response to Jane Doe 1's query about those
20 acts, Uribe asserted, "We were playing." When Jane Doe 1 asked why he "put his fingers up [her]
21 vagina," Uribe made a similar admission: "Because I like it." Following this pretext phone call,
22 police arrested Uribe.

23 Based on information provided by Jane Doe 1, an investigator from the district attorney's
24 office went to an apartment complex at which Uribe had resided. The investigator discovered that
25 a number of complaints had been filed with the complex's security office in 1997, alleging Uribe
26 had molested or bothered other young girls. The investigation into these incidents led to the
27 charges involving Jane Doe 2, Jane Doe 3, and Jane Doe 4.
28

Uribe molested Jane Doe 2, then 11 years old, in July 1996 when he was at her apartment. Uribe entered her room, closed the door and put a chair under the knob to prevent it from being opened. He then got on top of Jane Doe 2 on the bed. He rubbed her breast with one hand and covered her mouth with another hand. He tried to take off her jacket and he tried to kiss her.

Uribe's encounters with Jane Doe 3, fourteen years old at the time of trial, included one incident where he grabbed and pulled her onto his lap, another incident where he removed his shirt and pants and stood in front of her in his underwear, and another incident where he got on top of her in his bedroom.

Uribe's encounters with Jane Doe 4, fourteen years old at the time of trial, included incidents where he rubbed her buttocks and tried to pull her into his apartment.

B. Case History

Following a jury trial in Monterey County Superior Court, Uribe was convicted of sixteen counts of engaging in a lewd act upon a child and one count of engaging in a forcible lewd act upon a child. As to each count, the jury found true the One Strike law allegation that Uribe committed qualifying offenses against multiple victims. Uribe was sentenced on December 14, 2001 to a total term of 100 years to life in prison.

Uribe unsuccessfully appealed. The California Court of Appeal affirmed the judgment of conviction with a sentence modification and denied Uribe's petition for writ of habeas corpus. The California Supreme Court denied the petition for review.

Uribe then filed this action. His federal habeas petition raises seven claims: (1) his rights to due process and a fair trial were violated when the court denied his motion to exclude his coerced statement to the police, (2) his rights to due process, a fair trial and equal protection were denied when the trial court admitted evidence of his prior misconduct under California Evidence Code section 1108, (3) his rights to due process and a fair trial were violated by the use of the CALJIC 2.50.01 jury instruction, (4) his rights to due process, a fair trial and a jury determination on all issues were violated by the court's failure to correctly instruct on probation eligibility, (5)

1 his right to counsel was violated when the trial court failed to conduct an adequate inquiry about
2 his complaints against his attorney, (6) his rights to due process and to be free from double
3 jeopardy were violated by the sentence imposed for multiple victims, and (7) the cumulative effect
4 of the foregoing errors deprived him of his rights to due process and a fair trial. The court ordered
5 respondent to show cause why the petition should not be granted. Respondent filed an answer and
6 petitioner filed a traverse. The matter is now ready for a decision on the merits.

7 8 **JURISDICTION AND VENUE**

9 This court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C.
10 § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged conviction
11 occurred in Monterey County, California, within this judicial district. 28 U.S.C. §§ 84, 2241(d).

12 13 **EXHAUSTION**

14 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
15 either the fact or length of their confinement are required first to exhaust state judicial remedies,
16 either on direct appeal or through collateral proceedings, by presenting the highest state court
17 available with a fair opportunity to rule on the merits of each and every claim they seek to raise
18 in federal court. See 28 U.S.C. § 2254(b),(c). The parties do not dispute that state court remedies
19 were exhausted for the claims asserted in the petition.

20 21 **STANDARD OF REVIEW**

22 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
23 custody pursuant to the judgment of a State court only on the ground that he is in custody in
24 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The
25 petition may not be granted with respect to any claim that was adjudicated on the merits in state
26 court unless the state court's adjudication of the claim: "(1) resulted in a decision that was
27 contrary to, or involved an unreasonable application of, clearly established Federal law, as
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1 determined by the Supreme Court of the United States; or (2) resulted in a decision that was based
2 on an unreasonable determination of the facts in light of the evidence presented in the State court
3 proceeding." 28 U.S.C. § 2254(d).

4 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court
5 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if
6 the state court decides a case differently than [the] Court has on a set of materially
7 indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000).

8 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if
9 the state court identifies the correct governing legal principle from [the] Court's decisions but
10 unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. "[A] federal
11 habeas court may not issue the writ simply because that court concludes in its independent
12 judgment that the relevant state-court decision applied clearly established federal law erroneously
13 or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A federal habeas
14 court making the "unreasonable application" inquiry should ask whether the state court's application
15 of clearly established federal law was "objectively unreasonable." Id. at 409.

17 DISCUSSION

18 A. Admission of Uribe's Confession To The Police

19 Uribe alleges his rights to due process and a fair trial were violated when the court denied
20 his motion to exclude his involuntary statements to the police. He contends his statements were
21 based on repeated promises of both legal and medical help as well as reduced jail time -- all of
22 which were conditioned upon Uribe giving a statement confirming Jane Doe 1's accusations.
23 Uribe's statements were made to police officer Stradan during a 30-minute interview conducted
24 about an hour after his arrival at the police station following his arrest. Before the allegedly
25 coerced statements were made, Uribe had made a phone call, had been advised of his Miranda
26 rights, and (during the interview) had already made some very damaging admissions.

27 The California Court of Appeal rejected Uribe's claim that his confession was coerced.
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Cal. Ct. App. Opinion, pp. 24-26. That court did not address whether the confession was coerced but instead concluded that any error that might have occurred was harmless. The court reasoned:

First, defendant had already admitted touching Jane Doe 1 on the buttocks and legs. Since “any touching” can constitute a lewd act under section 288, subdivision (a), these admissions were significant. Second, the evidence at trial was very strong. Jane Doe 1 recounted specific details of many touching incidents. She was able to pinpoint many dates and the places where the touchings occurred. She provided additional details regarding the circumstances of the touchings. She made spontaneous disclosures to friends at school. Although she did not provide details about the various touchings at first, she did provide such details a few days later, when she felt more comfortable talking to the female social worker. Finally, the admissions defendant made during the pretextual call were very damaging. He essentially admitted touching Jane Doe 1's vagina and putting his mouth on her vagina when, in response to Jane Doe 1's query about those acts, defendant asserted, “We were playing.” When Jane Doe 1 asked why he “put his fingers up [her] vagina,” defendant made a similar admission: “Because I like it.” In light of these factors, we conclude, beyond a reasonable doubt, that defendant was not prejudiced by any error with regard to the admission of his police interview.

Cal. Ct. App. Opinion, p. 26. The California Court of Appeal identified and applied the harmless error standard from Chapman v. California, 386 U.S. 18, 24 (1967). Cal. Ct. App. Opinion, p. 25.

The erroneous admission of a coerced confession is subject to harmless error analysis. Fulminate v. Arizona, 499 U.S. 279, 306-12 (1991). If, on direct review, the state court disposed of a constitutional error as harmless under an appropriate standard of review, federal courts must, for purposes of application of the “unreasonable application” clause of § 2254(d)(1), determine whether the state court’s harmless error analysis was objectively unreasonable. Medina v. Hornung, 386 F.3d 872, 878 (9th Cir. 2004).

The California Court of Appeal's harmless error analysis was not objectively unreasonable. The state court correctly identified the Chapman standard as the applicable standard of review on direct appeal and reasonably applied it. This court agrees with the state court's conclusion that any error was harmless. Before any of the allegedly coercive comments were made, Uribe had already admitted some lewd conduct to officer Stradan and had already admitted the most serious sex offenses during the recorded telephone call with Jane Doe 1. Both those statements were admitted at trial and were not possibly tainted by any coercion that may have later occurred. Jane Doe 1's own detailed account of Uribe's conduct in her testimony at trial also provided persuasive independent evidence of Uribe's criminal conduct. The believability of Jane Doe's complaints was

strengthened by evidence that other girls had independently complained of Uribe's similar sex offenses against them. Uribe is not entitled to the writ on his claim that his constitutional rights were violated by admission of evidence of an allegedly coerced confession.

B. Propensity Evidence

Uribe next asserts that the admission of evidence of his prior sex offense conviction under California Evidence Code section 1108 violated his constitutional rights to due process and equal protection.

California Evidence Code section 1101 provides, in relevant part: "(a) Except as provided in this section and Section[] . . . 1108, . . . evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion."

California Evidence Code section 1108(a), states, in relevant part, that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

California Evidence Code section 352 permits the court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of under prejudice, of confusing the issues, or of misleading the jury."

The prosecution moved to introduce Uribe's prior sexual offense conviction for misdemeanor sexual battery under section 1108, arguing the evidence was admissible under sections 1101 and 1108 and pointing out the similarities between the charged and uncharged offenses. After a hearing on the matter, the trial court found the evidence admissible under section 1108 and specifically found that its high probative value outweighed any prejudicial effect.

On appeal the California Court of Appeal rejected Uribe's claims. Relying on the California Supreme Court's earlier opinion in People v. Falsetta, 21 Cal.4th 903 (1999), which rejected constitutional challenges to section 1108, the California Court of Appeal summarily

1 rejected Uribe's due process and equal protection arguments. The California Court of Appeal then
 2 found that the trial court did not abuse its discretion under section 352 by determining that the
 3 probative value of the evidence of defendant's uncharged offenses outweighed its prejudicial
 4 effect.

5
 6 1. Due Process

7 A state's criminal law (such as an evidence law pertaining to criminal trials) does not violate
 8 the Fourteenth Amendment's Due Process Clause "'unless it offends some principle of justice so
 9 rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Montana
 10 v. Egelhoff, 518 U.S. 37, 43 (1996) (citation omitted). "It is not the State which bears the burden
 11 of demonstrating that its rule is deeply rooted, but rather respondent who must show that the
 12 principle of procedure violated by the rule (and allegedly required by due process) is so rooted
 13 in the traditions and conscience of our people as to be ranked as fundamental." Id. at 47 (citation
 14 and internal quotations omitted; emphasis in original) (rule that intoxication may be considered
 15 on the question of intent was not so deeply rooted as to be a fundamental principle enshrined by
 16 the Fourteenth Amendment). But simply finding a historical basis for or against a rule is not
 17 enough: "The Constitution does not encompass all traditional legal rules and customs, no matter
 18 how longstanding and widespread such practices may be. The Supreme Court has cautioned against
 19 the wholesale importation of common law and evidentiary rules into the Due Process Clause of
 20 [the] Constitution" United States v. LeMay, 260 F.3d 1018, 1024-25 (9th Cir. 2001), cert. denied,
 21 534 U.S. 1166 (2002).

22 No federal appellate court has yet reached the constitutionality of California Evidence
 23 Code section 1108. However, section 1108 is analogous to Federal Rule of Evidence 414, which
 24 governs the admissibility of evidence of prior conduct in cases of child molestation in federal
 25 court. The Ninth Circuit has rejected due process and equal protection challenges to Rule 414,
 26 and its reasoning guides this court's consideration of the very similar California law. See LeMay,
 27 260 F.3d at 1024, 1030. Rule 414 states that "evidence of the defendant's commission of another
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1 offense or offenses of child molestation is admissible, and may be considered for its bearing on
 2 any matter to which it is relevant.” Rule 414 does not violate due process because Rule 403 (the
 3 federal analog to California Evidence Code section 352) functions as a filter, resulting in the
 4 exclusion of evidence that is so prejudicial as to deprive the defendant of his right to a fair trial.
 5 Id. at 1026. In other words, the “application of Rule 403 to Rule 414 evidence eliminates the due
 6 process concerns posed by Rule 414.” LeMay, 260 F.3d at 1027 (quoting United States v.
 7 Castillo, 140 F.3d 874, 881 (10th Cir. 1998)).

8 California Evidence Code section 1108 functions in a similar fashion to Federal Rule of
 9 Evidence 414. Section 1108 allows for the introduction of evidence of prior sex offenses by a
 10 defendant accused of a sex offense and is subject to section 352 which excludes unduly prejudicial
 11 evidence. Like Rule 414, section 1108 does not pose a due process concern because the section
 12 352 filter (the state analog to the Rule 403 filter) does not allow the admission of section 1108
 13 evidence which is so prejudicial as to preclude the right to fair trial guaranteed by the Due Process
 14 Clause. Uribe has not shown “that the traditional ban on propensity evidence involves a
 15 ‘fundamental conception of justice’” which is violated by section 1108. See LeMay, 260 F.3d at
 16 1025. He thus has not shown that section 1108, which allows propensity evidence in the limited
 17 area of sex offense cases, on its face violates due process.

18 Section 1108 also did not violate due process as it was applied in Uribe's case. “The
 19 evidence of defendant’s sexual offenses against Katherine M. had substantial probative value in
 20 demonstrating defendant’s disposition to commit lewd acts upon young girls.” Cal. Ct. App.
 21 Opinion, p. 28.

22 The offenses against Katherine M. were quite similar to the offenses against Jane Does 1-
 23 4... [and] the evidence of defendant’s offenses against Katherine M. had an “independent
 24 source,” as Katherine had reported the crimes well before defendant committed the crimes
 25 against Jane Does 1-4.... By contrast, the potential for prejudice, jury confusion, or undue
 26 consumption of time posed by this evidence was low. The jury knew that defendant’s acts
 27 against Katherine M. resulted in a conviction and jail time. Thus, “the jury was not tempted
 28 to convict defendant of the charged offenses, regardless of his guilt, in order to assure that
 he would be punished for the uncharged offenses...” [Citation] Further, “the attention
 of the jury was not diverted to a determination whether or not defendant had committed the
 uncharged offenses, because that fact had been determined conclusively by the resulting
 ... conviction.” [citation].

1 Cal.Ct.App.Op.pp.28-29. Because the jury could draw from the evidence of Uribe's prior sex
2 offense the permissible inferences that he had the propensity to commit sex offenses against
3 minors and did commit the sex offenses charged in the present case, the admission of the evidence
4 that he had committed sexual battery on Katherine M. did not violate Uribe's right to due process.
5 See Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).

6 A further reason Uribe is not entitled to the writ is because he has not shown that the
7 California Court of Appeal's rejection of his due process claim was contrary to or an unreasonable
8 application of "clearly established Federal law, as determined by the Supreme Court of the United
9 States." 28 U.S.C. § 2254(d)(1). As the Ninth Circuit has recognized, there is not much in the way
10 of clearly established law on the propensity evidence question. "[T]he Supreme Court has never
11 expressly held that it violates due process to admit other crimes evidence for the purpose of
12 showing conduct in conformity therewith, or that it violates due process to admit other crimes
13 evidence for other purposes without an instruction limiting the jury's consideration of the evidence
14 to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions,
15 see Estelle [v. McGuire], 502 U.S. 62, 75 n.5 (1991)] ('Because we need not reach the issue, we
16 express no opinion on whether a state law would violate the Due Process Clause if it permitted
17 the use of "prior crimes" evidence to show propensity to commit a charged crime')." Garceau v.
18 Woodford, 275 F.3d 769, 774-75 (9th Cir. 2001), reversed on other grounds by 538 U.S. 202
19 (2003).

20
21 2. Equal Protection

22 The Ninth Circuit's decision in LeMay also guides this court's analysis of Uribe's equal
23 protection claim. In LeMay, the court held that Federal Rule of Evidence 414 did not violate the
24 Equal Protection Clause of the Fourteenth Amendment. First, the rule did not discriminate against
25 any group of individuals on the basis of a suspect or quasi-suspect class. LeMay, 260 F.3d at
26 1030. Second, Rule 414 did not infringe on a fundamental right, because defendants had "no
27 fundamental right to have a trial free from relevant propensity evidence that is not unduly
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prejudicial.” Id. at 1030. Because the Rule did not make distinctions based on a suspect class, or infringe a fundamental right, the Rule needed only to bear a “reasonable relationship to a legitimate government interest.” Id. at 1031. Prosecuting crime is a legitimate government interest, and Rule 414 allowed prosecutors to introduce relevant evidence in furtherance of that state interest. Id.

Just as the class of child molesters was considered not a suspect class in LeMay, the class of accused sex offenders is not a suspect class here. Section 1108 does not infringe on a fundamental right because there is no fundamental right to have a trial free from relevant propensity evidence that is not unduly prejudicial. Section 1108 need only bear a reasonable relationship to a legitimate government interest. It does so by aiding the effective prosecution of a quintessentially secretive crime by allowing the introduction of relevant evidence in sex offense cases. See People v. Falsetta, 21 Cal. 4th 903, 915 (Cal. 1999) (“the Legislature’s principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence”). Uribe has not shown that the application of § 1108 in his case violated his right to equal protection of the laws.

C. The Jury Instructions Regarding The Prior Sex Offenses

1. Background

Uribe contends that his right to due process was violated because the jury instructions could have been understood by a jury to permit his conviction based solely upon the fact of his prior sex offense and without finding each fact necessary to support the conviction beyond a reasonable doubt.

The jury was given these instructions on the use of the prior sex offenses evidence:

Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than those charged in the case. [¶] Sexual offense means a crime under the laws of a state or of the United States that involves any of the following: [¶] Any conduct made criminal by Penal Code Section 288(a) or 288(b)(1). The elements of these crimes are set forth elsewhere in these instructions. [¶] If you find that the defendant committed other sexual offenses you may, but are not

required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed other sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide. You must not consider this evidence for any other purpose.

Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses other than those for which he is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses.

CT 1044-1045 (brackets omitted); CALJIC 2.50.01 (2001 revision), CALJIC 2.50.1. The trial judge then instructed: "I want to emphasize that the preponderance standard applies only to the noncharged offenses. It does not lessen or change the People's burden to prove each and every element of the charged crimes beyond a reasonable doubt, not by a preponderance of the evidence." RT 3400. The jury also was instructed on the preponderance of the evidence standard, CT 1046, and was given the following standard reasonable doubt jury instruction:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

CT 1056; CALJIC 2.90.

The California Court of Appeal rejected Uribe's claim of instructional error, following the reasoning of People v. Reliford, 29 Cal. 4th 1007, 1009 (Cal. 2003), which had determined that the 1999 version of CALJIC No. 2.50.01 correctly stated the law. Ct. App. Opinion, pp. 30-31. The Reliford court had found no reasonable likelihood under the instructions given that the jury would conclude it could convict appellant of the current offense solely because it found that he had committed a similar prior sexual offense. See Reliford, 29 Cal. 4th at 1015-16. In rejecting Uribe's claim, the California Court of Appeal reasoned that, by giving the 2001 revised version of CALJIC 2.50.01, the trial court ensured that the jury would understand and reconcile the distinction between the preponderance of the evidence standard applicable to proof of prior sex

1 crimes, and the burden to prove each element of the current offenses beyond a reasonable doubt
2 by giving the additional cautionary instruction emphasizing that “the preponderance standard
3 applies only to the noncharged offenses” and that the People still had the burden “to prove each
4 and every element of the charged crimes beyond a reasonable doubt, not by a preponderance of the
5 evidence.” Cal. Ct. App. Opinion, pp. 30-31.

6
7 2. Analysis

8 To obtain federal collateral relief for errors in the jury charge, a petitioner must show that
9 the ailing instruction by itself so infected the entire trial that the resulting conviction violates due
10 process. See Estelle v. McGuire, 502 U.S. at 71-72. It is beyond dispute that the Fourteenth
11 Amendment's Due Process Clause requires that a defendant be presumed innocent until proven
12 guilty and that he may only be convicted upon a showing of proof beyond a reasonable doubt
13 and that the jury be properly instructed that a defendant is presumed innocent until proven guilty
14 beyond a reasonable doubt. Gibson v. Ortiz, 387 F.3d 812, 820 (9th Cir. 2004) “Any jury
15 instruction that 'reduce[s] the level of proof necessary for the Government to carry its burden . .
16 . is plainly inconsistent with the constitutionally rooted presumption of innocence.'” Id. (quoting
17 Cool v. United States, 409 U.S. 100, 104 (1972)). So long as the trial court instructs jury on the
18 necessity that defendant’s guilt be proven beyond a reasonable doubt, the Constitution does not
19 require that any particular form of words be used in advising the jury of the government’s burden
20 of proof. See Gibson, 387 F.3d at 825.

21 In reviewing an ambiguous instruction, the court must inquire whether there is a reasonable
22 likelihood that the jury has applied the challenged instruction in a way that violates the
23 Constitution. See Estelle, 502 U.S. at 72 & n.4; Boyde v. California, 494 U.S. 370, 380 (1990).¹
24 A determination that there is a reasonable likelihood that the jury has applied the challenged
25 instruction in a way that violates the Constitution establishes only that an error has occurred,
26

27 ¹If the instruction describes the burden of proof incorrectly, rather than is merely
28 ambiguous, the Estelle approach does not apply. See Gibson, 387 F.3d at 822 n.8. This is not a
case of misdescription of the burden of proof.

1 however. See Calderon v. Coleman, 525 U.S. 141, 146 (1998). If an error is found, the court also
2 must determine that the error had a substantial and injurious effect or influence in determining the
3 jury's verdict, see Brecht, 507 U.S. at 637, before granting relief in habeas proceedings. See
4 Calderon, 525 U.S. at 146-47.

5 The jury instructions given at Uribe's trial did not incorrectly describe the burden of proof
6 or permit conviction upon a standard less than proof beyond a reasonable doubt of every element
7 of the charged crimes. One of the challenged instructions given in this case is the 2001 revised
8 version of CALJIC 2.50.01 which includes the language: "if you find by a preponderance of the
9 evidence that the defendant committed other sexual offenses, that is not sufficient by itself to
10 prove beyond a reasonable doubt that he committed the charged crimes." Additionally, Uribe's
11 jury received an additional admonition by the court emphasizing "that the preponderance standard
12 applies only to the noncharged offenses. It does not lessen or change the People's burden to prove
13 each and every element of the charged crimes beyond a reasonable doubt, not by a preponderance
14 of the evidence." RT 3400. When viewed in light of the other instructions given by the court and
15 the specific reminder from the court, the revised CALJIC 2.50.01 given at Uribe's trial made clear
16 that even if the jury found that Uribe committed prior sexual offenses by a preponderance of the
17 evidence and drew the inference that he was likely to commit and did commit the crimes of which
18 he was accused, that alone was not sufficient to prove beyond a reasonable doubt that he
19 committed the charged crimes. There is no reasonable likelihood that the jury applied the
20 challenged instructions to convict the Uribe upon a preponderance of the evidence or anything
21 below proof beyond a reasonable doubt.

22 The instructions used at Uribe's trial were not the same as those determined to be
23 constitutionally infirm in Gibson v. Ortiz, 387 F.3d 812. In Gibson, the jury was instructed with
24 the pre-1999 version of CALJIC 2.50.01 which did not tell the jury that the inference it could
25 draw from the prior sex offense was not enough to prove guilt on the charged crime beyond a
26 reasonable doubt. The problem was compounded by the use of a modified version of CALJIC
27 2.50.1 that stated the preponderance of the evidence standard as the burden of proof for prior
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1 sexual offenses. The "interplay of the two instructions allowed the jury to find that Gibson
2 committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that
3 he had committed the charged acts based upon facts found not beyond a reasonable doubt, but by
4 a preponderance of the evidence." Id. at 822. The Gibson instructions, carefully followed by the
5 jury, would allow Gibson's conviction based on a finding made on the unconstitutionally low
6 preponderance of the evidence standard. By contrast, Uribe's jury instructions, carefully followed
7 by the jury, would not permit Uribe's conviction based on anything less than proof beyond a
8 reasonable doubt of all elements of the crimes charged.

9 The California Court of Appeal's rejection of Uribe's claim was not contrary to or an
10 unreasonable application of clearly established federal law. Uribe is not entitled to the writ on this
11 claim.

12
13 D. Sentencing Claims

14 Uribe contends that the trial court's failure to instruct on proof of probation ineligibility
15 for the lewd conduct offenses violated his right to have a jury determine all the elements of a
16 charge. See Apprendi v. New Jersey, 530 U.S. 466 (2000). Uribe further contends that he is not
17 subject to the provisions of the One Strike law, Cal. Penal Code § 667.61, if there is a
18 determination that he is eligible for probation, and, therefore, the jury must determine probation
19 eligibility. He also contends the state court did not follow state law in deciding applying the
20 multiple victim special circumstance. And he contends that the use of the multiple victim
21 circumstance violated his right to be free from double jeopardy.

22
23 1. The Probation Eligibility Issue

24 "Other than the fact of a prior conviction, any fact that increases the penalty for a crime
25 beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a
26 reasonable doubt." Apprendi, 530 U.S. at 489. The statutory maximum for Apprendi purposes is
27 the maximum sentence a judge could impose based solely on the facts reflected in the jury verdict
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1 or admitted by the defendant; that is, "the relevant 'statutory maximum' is not the maximum
2 sentence a judge may impose after finding additional facts, but the maximum he may impose
3 without any additional findings." Blakely v. Washington, 542 U.S. 296, ---, 124 S.Ct. 2531, 2537
4 (2004).

5 California Evidence Code section 667.61(b) provides that a "person who is convicted of
6 an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e)
7 shall be punished by imprisonment in the state prison for life and shall not be eligible for release
8 on parole for 15 years...." Subdivision (c) lists the specified offenses, including "(7) A violation
9 of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision
10 (c) of Section 1203.066." Cal. Penal Code § 667.61(c)(7).

11 Uribe does not persuade with his argument that the jury had to decide whether he qualified
12 for probation. First, the text of the state law requires the probation eligibility determination to
13 be made based on the findings of "the court," not the jury. Cal. Penal Code § 1203.066(c).

14 Second, unlike Uribe's case, Apprendi involved an increase to the defendant's maximum
15 possible sentence based on a factual finding by the court. A finding of probation eligibility would
16 lessen rather than increase Uribe's sentence. Even though probation would impact Uribe's
17 sentence, that alone did not require that the jury make the necessary findings because it could not
18 increase the penalty authorized by the jury's verdict.

19 Lastly, any error was harmless. See Dillard v. Roe, 244 F.3d 758, 773-74 (9th Cir.), cert.
20 denied, 534 U.S. 905 (2001) (fact that a jury did not find beyond a reasonable doubt that defendant
21 used a firearm in the commission of the offense was subject to the harmless error analysis set
22 forth in Brecht). Uribe was not eligible for probation under the terms of section 1203.066
23 because he did not meet the requirement that he be "the victim's natural parent, adoptive parent,
24 stepparent, relative, or is a member of the victim's household who has lived in the victim's
25 household." Cal. Penal Code § 1203.066(c)(1).

26
27 2. Multiple Victim Circumstance
28

Uribe's other sentencing claim is that the state court violated his right to due process because it did not correctly interpret the state law in applying the multiple victim circumstance.² His brief shows that he was raising a novel argument about the way the multiple victim circumstance should work, and did not point to any California Court of Appeal or California Supreme Court decision that was contrary to the approach taken by the California Court of Appeal in this case. This court generally will not, in a habeas case, revisit a determination of state law by the state appellate court. See Hicks v. Feiock, 485 U.S. 624, 629-30 (1988) (court is not free to review state court's determination of state law); cf. id. at 630 n.3 (quoting West v. American Telephone & Telegraph Co., 311 U.S. 223, 237-38 (1940) (determination of state law made by an intermediate appellate court must be followed and may not be "disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise")). Once one accepts that California law is that the multiple victim circumstance could apply to the many One Strike sentences imposed, the result for Uribe's habeas claim is inevitable. The trial court's application of the multiple victim circumstance to the numerous offenses was correct under California law and therefore did not violate Uribe's right to due process.

Uribe also does not persuade with his claim that the multiple victim circumstance, as applied here, violated his constitutional right to be free from being placed twice in jeopardy. The use of prior convictions to enhance sentences for subsequent convictions, for example, does not violate the Double Jeopardy Clause. See Spencer v. Texas, 385 U.S. 554, 560 (1967) (upholding use of prior convictions to enhance sentences for subsequent convictions even if in a sense defendant must relitigate in sentencing proceeding conduct for which he was already tried); Jackson v. Nelson, 435 F.2d 553, 553 (9th Cir. 1971) (dismissing double jeopardy challenge to recidivist statute as meritless). Consideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct. See Witte v. United States, 515 U.S. 389, 406 (1995). A court therefore may later

²Uribe's fourteen convictions and sentences under California Penal Code section 667.61 were based on a multiple victim special circumstance. Uribe contends that because there were only four victims, the court erred in applying that circumstance more than four times.

1 convict and sentence a defendant for a crime involving that conduct without violating the Double
2 Jeopardy Clause's prohibition against the imposition of multiple punishments for the same
3 offense. See United States v. Jernigan, 60 F.3d 562, 564-65 (9th Cir. 1995)(upholding defendant's
4 conviction for failing to appear even though, in prior case, defendant's sentence had been enhanced
5 for obstruction of justice based on the same failure to appear). The repeated use of the multiple
6 victim circumstance to determine the appropriate sentences on the many counts of which Uribe
7 was convicted did not violate his rights under the Double Jeopardy Clause.

8
9 E. Substitution of Counsel Request

10 1. Background

11 Uribe claims his right to effective assistance of counsel was violated when the trial court
12 failed to conduct an adequate inquiry about his claims against his attorney.

13 On November 8, 2000 (several months before trial began), defendant requested
14 substitution of appointed counsel pursuant to People v. Marsden, supra 2 Cal. 3d 118.
During an in camera hearing, defendant told the trial court, "I feel like my attorney's not
15 helping me."

16 Defendant submitted a written statement in support of his Marsden motion.
Defendant complained that he did not meet with a defense investigator until about nine
17 months after his arrest and that the investigator did not follow up when he told her he had
additional information for her. Defendant also asserted that he requested that his appointed
18 counsel at the time, Deputy Public Defender Kleinkopf, ask for dismissal of the case
because "the District Attorney was not supposed to investigate this case personally."
19 Counsel had refused to request dismissal on that basis. Counsel had also failed to follow
up on defendant's allegation that the deputy District Attorney had "a conflict of interest with
20 this victim in a previous case."

21 During the hearing, the trial court noted that "the gist of your complaints is that your
case was not investigated in a timely fashion." The trial court asked defendant if he wished
22 to add anything. Defendant reiterated his complaint about the investigator failing to visit
him for some time. He reiterated his belief that it was improper for the Deputy District
23 Attorney to perform personal investigation. He asserted that "the D.A. knows the mother
of the victim" and asked "that's conflict, right?" Defendant also added that he had asked the
24 investigator and counsel "to check the D.A.'s investigator because they changed some
statements." Defendant complained that counsel had not "fought to remove some of the
25 charges" and had not given him "reports about what's going on." He complained that counsel
was pressuring him into accepting a plea bargain.

26 The trial court addressed defendant's complaints: "I'm not aware of anything that
27 prevents the District Attorney from investigating the case. As far as the District Attorney
being acquainted with someone who's a complaining witness in the case, in these cases I
28 think that probably inevitably happens that at some point the District Attorney becomes

1 acquainted with the people involved in the case. I don't know if you're suggesting that the
 2 District Attorney had a friendly relationship with one of the witnesses in the case before
 3 this case arose or simply that a relationship of some sort has developed as the case has
 4 progressed. If you know."

5 After defendant requested the trial court "repeat that last part," the trial court stated:
 6 "You indicated one of the things that you think is a problem, I'm not sure why it's a problem
 7 involving your attorney, but that the District Attorney has a relationship or a friendship with
 8 one of the witnesses in the case or the victim in the case or something. I'm not sure exactly
 9 what you mean, but again I'm not clear if that's some sort of friendship relationship that
 10 arose before this case arose or if this is something that's developed after this case started."
 11 Defendant stated, "They knew each other before." Defendant asserted that his former
 12 retained counsel and his current attorney had both confirmed that fact.

13 The trial court next explained that defendant's former counsel had brought a motion
 14 to dismiss some of the charges and that "[y]ou can't keep making the same motions over
 15 again if it was made and denied."

16 Counsel asserted that he tried to follow up on everything defendant told him. He
 17 stated that he had visited defendant "fairly regularly" and explained that his investigator had
 18 been sick for over three weeks, but was working on the investigation. Counsel stated that
 19 he was not going to make a motion to relieve the prosecutor because he did not believe she
 20 had done anything improper by talking to witnesses.

21 Counsel opined that defendant's Marsden request was precipitated by counsel's
 22 advice that defendant accept the prosecutor's offer. Counsel had explained to defendant the
 23 weaknesses in the case, and defendant had become angry, claiming his innocence. Counsel
 24 asserted, "I will do the best I can with what I have, and I will advise him based on what I see,
 25 what the evidence is in the case, and I'm not going to just tell him what he wants to hear."
 26 Counsel noted that the case was set for trial the following week, and asserted that he would
 27 probably be ready at that time.

28 Defendant asked the trial court, "If you're not going to [replace counsel], I ask if you
 could give me more time so they can do a good investigation. . . ."

The trial court denied the Marsden motion, finding no "legal basis to remove your
 attorney." The trial court found that counsel had made "a good faith effort to get this case
 investigated, get it ready for trial" and indicated that it would grant the defense additional
 time for investigation if necessary.

Ultimately, Deputy Public Defender Kleinkopf withdrew from the case and was
 replaced by Deputy Public Defender Hatcher, who represented defendant throughout trial.

Cal. Ct. App. Op. pp. 39-41. The trial date that had been set to start the week after the Marsden
 hearing was postponed for a few months by agreement of the parties. See Nov. 18, 2000 RT 18.

2. Analysis

The Sixth Amendment grants criminal defendants who can afford to retain counsel a
 qualified right to hire counsel of their choice. See Wheat v. United States, 486 U.S. 153, 159, 164

(1988). A criminal defendant who cannot afford to retain counsel has no right to counsel of his own choosing. See id. Nor is he entitled to an attorney who likes and feels comfortable with him. The Sixth Amendment guarantees effective assistance of counsel, not a "meaningful relationship" between an accused and his counsel. See Morris v. Slappy, 461 U.S. 1, 14 (1983).

In California, People v. Marsden, 2 Cal.3d 118 (1970), requires the trial court to permit a criminal defendant requesting substitution of counsel to specify the reasons for his request and generally to hold a hearing. The denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel and is properly considered in federal habeas. See generally Schell v. Witek, 218 F.3d 1017, 1024-25 (9th Cir. 2000). In reviewing the state courts' rejection of a Uribe's Sixth Amendment claim, the "ultimate constitutional question" on federal habeas review is whether the state trial court's denial of the Marsden motion "actually violated [petitioner's] constitutional rights in that the conflict between [the defendant] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Schell, 218 F.3d at 1026.

Uribe's claim is somewhat ambiguous in that one cannot determine whether it is a claim that his right to counsel was violated or that the counsel provided ineffective assistance. The claim fails under either approach.

The California Court of Appeal properly upheld the trial court's denial of Uribe's request. Uribe moved for substitution of counsel and, in accord with the dictates of the Sixth Amendment, the trial court inquired into Uribe's concerns. See Hudson v. Rushen, 686 F.2d 826, 831 (9th Cir. 1982) (state court conducted adequate hearing when it invited defendant to make a statement and listened to defendant's reasons for wanting new counsel). The record shows that the trial court made a thorough inquiry into Uribe's complaints about counsel. During the hearing the court asked Uribe to state his complaints about his attorney and the court listened and attempted to clarify some of Uribe's complaints. The court then allowed Uribe's attorney to respond to each of the complaints. Uribe spoke again after his attorney and then the court made its ruling. The record

1 indicates the court contemplated the reasons supporting Uribe's motion before denying the
2 motion.

3 The trial court's determination that counsel was performing adequately and that no
4 irreconcilable conflict existed was not unreasonable. Counsel had explained that his investigation
5 of the case was ongoing (although it had been hampered by the illness of his investigator) and he
6 intended to continue the investigation. Nov. 8, 2000 RT 10. Counsel explained that he chose not
7 to move to recuse the district attorney because the relationship between the district attorney and
8 the mother of one of the complaining victims did not appear a sound basis for such a motion.
9 See id. at 9. Counsel opined that a large part of Uribe's frustration with him resulted from
10 counsel's performance of his professional obligations, i.e., refusing to renew unsuccessful
11 motions, providing a legally accurate analysis of the case rather than just agreeing with everything
12 the client said, being civil toward the district attorney (who Uribe intensely disliked), and relaying
13 plea bargain offers from that district attorney to Uribe. See id. at 10-13. In light of the
14 information provided at the hearing, it was not unreasonable for the court to think that Uribe's
15 frustration with appointed counsel's exercise of his professional obligations would continue with
16 new counsel and therefore did not warrant new counsel. That is, new counsel also would also have
17 to refuse to refile unsuccessful motions, would have to tell Uribe the harsh realities of his
18 defense, would have to deal with the district attorney in a civil manner, and would have to relay plea
19 bargain offers that Uribe did not want to hear. Appointment of new counsel wouldn't end the
20 frustration that was more a product of Uribe's predicament as a criminal defendant rather than
21 counsel's behavior. And the fact that counsel had not completed his investigation also did not
22 show an irreparable breakdown of the attorney-client relationship as counsel indicated he was
23 continuing to investigate the case. Finally, even if one assumed there had been an adequate
24 showing to require the appointment of a new attorney, Uribe received that relief when a new
25 attorney was later appointed to replace the defense attorney about whom Uribe had complained.

26
27 If Uribe's claim is viewed as one for ineffective assistance of counsel by the attorney who
28

1 was the subject of the Marsden motion, his claim also would fail. After the Marsden hearing,
2 another attorney was substituted in to represent him. The defense counsel against whom Uribe
3 filed the Marsden motion was not the attorney representing Uribe at trial and Uribe has provided
4 no evidence at all that the former attorney did anything that was irreparably harmful to his defense
5 at trial. He has shown no prejudice, as he must to prevail on an ineffective assistance of counsel
6 claim. See Strickland v. Washington, 466 U.S. 668, 691-94 (1984) (ineffective assistance of
7 counsel claimant must show deficient performance and resulting prejudice, i.e., that there is a
8 reasonable probability that, but for counsel's errors, the result of the proceedings would have been
9 different).

10 Bearing in mind that the "purpose of providing assistance of counsel 'is simply to ensure
11 that criminal defendants receive a fair trial,'" Wheat, 486 U.S. at 159, this court sees no evidence
12 that that purpose went unfulfilled in this case or that a Sixth Amendment violation occurred. The
13 California Court of Appeal's rejection of Uribe's claim was neither contrary to nor an unreasonable
14 application of clearly established federal law. Accordingly, Uribe is not entitled to the writ on this
15 claim.

16
17 F. Cumulative Error

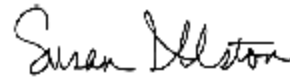
18 Uribe claims the cumulative effect of the errors set out in his petition deprived him of his
19 rights to due process and a fair trial. In some cases, although no single trial error is sufficiently
20 prejudicial to warrant relief, the cumulative effect of several errors may still prejudice a defendant
21 so much that his conviction must be overturned. See Alcala v. Woodford, 334 F.3d 862, 893 (9th
22 Cir. 2003). Here, there was at most a single error as both this court and the California Court of
23 Appeal decided that the admission of the confession was harmless error (if any error at all). The
24 cumulative doctrine does not warrant any relief when there is only one possible error and it has
25 been determined to have been harmless.

26
27 **CONCLUSION**
28

1 The petition for writ of habeas corpus is DENIED. The clerk shall close the file.

2 IT IS SO ORDERED.

3 DATED: September _15_, 2005



4 SUSAN ILLSTON
United States District Judge

